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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

W. J. MEREDITH, JAMES G. MARTIN and A. R. OHMART,

Petitioners

vs.

THE CITY OF WINTER HAVEN, a municipal corporation, et. al.,

Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The "Statement of Matters Involved" in the Petition contains conclusions and assumptions of fact that are not in the record, but the opinion of the Circuit Court of Appeals contains an accurate statement of the facts and issues. There is no conflict of fact since the case was decided on Defendants' Motion to Dismiss the Complaint.

The decision of the majority of the Circuit Court of Appeals rests upon seven conclusions:

1. "Every question presented for decision * * * * is a question of State cognizance to be determined under controlling State law".

2. "Our examination of the state of the law in Florida on the matters in issue shows that *it is not clear, settled and stable, but quite the contrary*".

3. "In the *Sullivan* case (the case so strongly relied on by the Petitioners) there was no question of deferred or accumulated interest coupons, none, therefore, of the proportion of them which could be paid in the event of call and redemption of the bonds before maturity, nor in the later cases which Appellants claim are in conflict with it, was there any question, as here, of whether under Florida decisions * * * the coupons should be held valid under the *Sullivan* case, notwithstanding the later rulings".

4. "It has been the rule of the Federal Courts where questions of State law involving provisions of statutes or of Constitutions, especially when dealing with matters of general public concern in a particular State, to decline to determine the State law and to remit the litigants to the State Courts for their determination".

5. "It would be especially unwise here for the Federal Court to undertake in a Declaratory Judgment to determine the questions here presented".

6. "It would be undertaking to declare the public policy of the State in respect of obligations of its municipalities".

7. "Especially in equity cases is it true that Federal Courts * * * will refrain from exercising it to determine State law".

Judge Sibley, in his dissenting opinion, said that because of the decisions of the State Court, the Federal Court was

"compelled to accept it (them) as the law of Florida", but that Petitioners should receive

> "so much interest promised in the old bonds as would make good the loss caused by the penalty enforceable on the new bonds",

because that question had not been

> "foreclosed by the decision in the *Andrews* case".

The only real difference between the majority and the minority opinions is as to whether the decisions of the State Court of Florida were "clear, settled and stable" in their rulings.

The Petition should be denied because the majority of the Court of Appeals held that the law of Florida, as applied to Plaintiffs' claims, is not only "not clear, settled and stable, but is quite the contrary"; Petitioners should, therefore, be remitted to the State Court for a determination of their rights. This decision accords with the decisions cited by the Court of Appeals and with the action of this Court in *Thompson vs. Magnolia Petroleum Co.*, 309 U. S. 478, and *Wichita Royalty Co. vs. City National Bank*, 306 U. S. 103. In the last cited case this Court reversed the Fifth Court of Appeals because it did construe a later Texas decision as a reversal of an earlier one. The petition should also be denied if, as Judge Sibley said, the Federal Court is bound to follow the decisions of the Florida Supreme Court, especially that of *Andrews vs. Winter Haven*, 148 Fla. 144, 350 (2d) 805, which denied to a Florida holder of bonds of the same issue, the principal prayer of Petitioners. The question of whether Petitioners are entitled to an equitable recoupment is a question of local law and

should also be first determined by a State Court, since it necessarily involves an exercise of equitable discretion by the Trial Court, and a review by this Court would constitute merely an appeal from the Circuit Court.

The decision in the *Sullivan* case (101 Fla. 298, 134 So. 211) is not in conflict with the decisions of the Florida Court in *Outman vs. Cone*, 141 Fla. 196, 192 So. 611, *Taylor vs. Williams*, 142 Fla. 402, 195 So. 175, and 142 Fla. 562, 195 So. 184, *State vs. Special Tax School District No. 3*, 143 Fla. 557, 197 So. 127, *Andrews vs. Winter Haven*, supra, and *State vs. City of New Smyrna Beach*, 148 Fla. 482, 4 So.(2d) 660. In fact Petitioners claim is only that the decisions in those cases are inconsistent with the reasoning of the opinion in the *Sullivan case*, not that they constitute a reversal of it. The form in which the "Questions Presented" is phrased shows that they have evaded making such a claim and seeks to create that impression. Petitioners do not claim that the Supreme Court of Florida ever held that holders of bonds bearing deferred interest coupons have a right to make good any loss upon a theory of equitable subrogation, or that the majority opinion is in conflict with Florida law on this subject. *Jefferson Co. vs. Hawkins*, 23 Fla. 223, 2 So. 362, the only case cited by them (P. 29), held that valid bonds could not be paid by the delivery of void refunding bonds. There is no Federal question involved in this case and since Petitioners have not, either in their Petition or brief, shown that the applicable law of Florida is "clear, settled and stable" in support of their argument, or in conflict with the decision of the Circuit Court of Appeals, the Petition should be denied.

By a circuity of reasoning Petitioners seek to utilize the decision in *Gelpcke vs. Dubuque*, 1 Wall (U. S.) 175,

as a basis for their petition. In order to justify the use of the decision in *Gelpcke vs. Dubuque*, supra, and other similar decisions it would be necessary to show as a matter of fact that the State Court has reversed its earlier decision which was in effect when the bonds were issued. The facts in this case are entirely different because:

1. In that case, the Supreme Court of Iowa first held constitutional a statute of the State authorizing the City to issue bonds, and plaintiff purchased his bonds in reliance upon the statute and decision; after which the Supreme Court of Iowa expressly reversed its former decision and held the statute unconstitutional, and the bonds void. No such situation is presented by this record.

2. As the Circuit Court of Appeals points out, *Sullivan vs. Tampa*, supra, did not hold that the City had power to issue bonds carrying deferred interest coupons with provisions for redemption similar to those contained in the bonds of Winter Haven.

3. The later Florida cases not only did not reverse *Sullivan vs. Tampa*, supra, but in *Miami vs. State*, 139 Fla. 598, 190 So. 774, the Florida Court implied that there was no inconsistency in the decisions because of the difference in the factual situation involved.

4. The bonds involved in the *Sullivan* case were issued under Chap. 11855, Acts of 1927, passed three years before the adoption of the Amendment to Sec. 6, Art. IX of the Florida Constitution. The bonds in this case were issued under Chap. 15772, enacted in 1931, after that Amendment was adopted. There are many points of distinction between

these Acts: for example, the Act of 1927 contained no limitation on the price that could be paid for redemption; the 1931 Act limits the price at which the City could redeem to the par value of the bonds. (See Sec. 3 of that Act, Appendix A).

5. *Outman vs. Cone, Taylor vs. Williams, State vs. Special Tax School District No. 3, Andrews vs. Winter Haven* and *State vs. City of New Smyrna Beach*, op. cit supra, which have expressly held that the City may redeem at par its bonds carrying deferred interest coupons, are only a few in a long line of Florida cases construing the proviso in the Amended Sec. 6, Art. IX that permits the issue of refunding bonds without an election. All of those cases have held various plans, schemes or provisions, that were intended to evade the express prohibition against issuing bonds without an election, to be void.

Bal County vs. State, 116 Fla. 656, 157 So. 1; *State vs. Citrus County*, 116 Fla. 676, 157 So. 4; *Pierce vs. Isaac*, 131 Fla. 666, 184 So. 509; *Motes vs. Putnam County*, 143 Fla. 134, 196 So. 465; *Suwannee County vs. State*, 147 Fla. 477, 2 So. (2d) 850; *Miami vs. State*, 139 Fla. 598, 190 So. 774; *Fahs vs. Kilgore*, 136 Fla. 701, 187 So. 170; *Kathleen Citrus Co. vs. City of Lakeland*, 124 Fla. 659, 169 So. 356; *Boykin vs. Town of River Junction*, 121 Fla. 902, 164 So. 558; and *Brash vs. State Tuberculosis Board*, 124 Fla. 167, 167 So. 827 and 124 Fla. 652, 169 So. 218.

The *Outman* opinion, (which preceded by several years *Andrews vs. Winter Haven*), expressly held that provisions similar to those of the bonds involved in this case could

not be included, unless the issuance of the bonds had been approved by the taxpayers, because

> "refunding bonds constitute nothing more than an extension of the original obligation under the same taxing power, and that if more is attempted, the refunding issue must be approved by the freeholders * * * If new or additional or more burdensome terms are to be attached to the refunding bonds, Sec. 6 of Art. IX required that they be approved by the freeholders";

that the bonds disclosed

> "a material departure from the terms of the original bonds"

and that

> "The exact point of cleavage (that is, between refunding bonds which could be issued without an election and those which could not) appears to be whether or not the amount of deferred interest must be posted in favor of the holders of old bonds when they are called in the manner provided".

It concluded that the bonds provided

> "ground to jockey the bond situation and impose an undue hardship on the taxpayer by exacting the amount claimed. (A sum in excess of the par value of the bond). It further paves the way to violate Sec. 6, Art. IX by indirection'.

The Supreme Court condemned the provisions because they indirectly violated the purpose of the Amendment. No such question was involved in the *Sullivan* case. In that case there was a single question of law. The question in this case was decided by the Florida Court on the facts.

Petitioners refer to *Columbia County vs. King*, 13 Fla. 451 (P. 23 Petition), and other Florida cases which they claim adopt the rule of *Gelpcke vs. Dubuque*, supra. But in all of those decisions (except *State ex rel Nuveen vs. Greer*, 88 Fla. 249, 102 So. 739,) the Court refused to reverse its earlier decisions.

If those opinions have any bearing on this case, it is because they show conclusively that the Florida Court has always refused to reverse decisions by it that have become a rule of property upon which parties had relied. That is the law of Florida. They sustain our contention that the Supreme Court of Florida did not reverse *Sullivan vs. Tampa*, supra, or any other decision.

In *State ex rel Nuveen vs. Greer*, supra, the Florida Court, *after bonds had been issued*, held that the statute under which the bonds had been issued was void, and pointed out that its decision was not inconsistent with *Columbia County vs. King*, supra, because it had not held the Statute valid before the bonds were issued. It would be improper for Federal Courts to impute to the Florida Supreme Court, despite these repeated assertions of a contrary policy, either a reversal or an intention to reverse *Sullivan vs. Tampa*. Since it has consistently refused to reverse in other instances and there is no word in its recent opinions that could be construed as evidence of an intention to reverse *Sullivan vs. Tampa*, Federal Courts should not assume an inconsistency.

Judge Sibley thought that the question of whether the Plaintiffs should, by the resolution authorizing the issuance of the bonds, be subrogated to a claim for additional in-

terest was not ruled upon by the Florida Court. If he is correct that fact does not raise a Federal question, nor a question of constitutional law; but a question of State law only,—a matter of the State policy as to its subdivisions. It is not a question of importance outside of Florida.

The opinion of the majority of the Circuit Court of Appeals that the Plaintiffs under the circumstances should seek relief in the Florida Courts, where the law of Florida is found, accords with all decisions of Federal Courts since *Erie vs. Tompkins*, 304 U. S. 64, and avoids the possibility of a conflict between State and Federal Courts as to the rights of parties under State law.

The scheme or plan of the 1933 refunding would have penalized the City for exercising its statutory right to redeem its bonds at par, by imposing a penalty for redemption despite the provisions of Sec. 3, Chap. 15772. Judge Sibley's opinion would result in compelling the City to pay a premium which the Florida Court has held it cannot pay.

If the express contract to pay a premium be void, how can a Court of Equity in the exercise of its conscience compel the payment of more than would be due under the contract if it were valid? Such a decision would place a 100 percent premium on illegality. Judge Sibley must have realized this, since he suggested that some other basis of equitable adjustment might be found. But he did not suggest another basis. There is nothing in any Florida case that would indicate that there is, or should be another basis.

The decision of this case should be controlled by the law of Florida. If that law is not "clear, stable and settled",

a Federal Court should not attempt to decide what it is. A Federal Court cannot grant relief to non-residents that a Florida Court has denied to a resident; especially where, as in this case, the Federal Court must first assume that the Florida Court has, contrary to its own long established rule, reversed an earlier decision, notwithstanding the fact that the Florida Court has not even indicated an intent so to do. Any decision other than that rendered by the Circuit Court of Appeals, would in effect impute to the Florida Supreme Court an act it did not intend, and give Petitioners rights that the Florida Court has held that a resident holder did not have.

Respectively submitted,

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Attorneys for Respondents.

APPENDIX A

Section 3. Such resolution or resolutions shall determine the rate or rates of interest to be paid, not exceeding six per centum per annum, payable annually or at shorter intervals, and the maturity or maturities of the bonds which shall be at a time or times not exceeding sixty years from the date of the bonds, (except that in the issuance of bonds of taxing districts where the maturities are fixed under the Constitution, then such maturities shall be in accordance with the maturities fixed in the constitutional provision), as well as determine the medium of payment and the place or places in Florida or any other state at which the principal and interest shall be payable. *In the discretion of the governing body the right to redeem all or any of the bonds at par before maturity may be reserved upon terms and conditions to be fixed by resolution.* (Italics ours)